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Public Prosecutor v Alias bin Md Yusof

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-06B-18–04 OF 2018
UMI KALTHUM, STEPHEN CHUNG AND MOHAMAD ZABIDIN JJCA
14 FEBRUARY 2019

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Criminal Law — Bribery — Accepting gratification — Respondent charged under s 16(a)(B) of the Malaysian Anti-Corruption Commission Act 2009 — Respondent acquitted and discharged by sessions court and High Court — Appeal against acquittal and discharge — Whether there was doubt on prosecution's case — Whether court ought to interfere with findings of facts — Whether sessions court judge and learned judicial commissioner correct to acquit and discharge respondent — Malaysian Anti-Corruption Commission Act 2009 ss 16(a)(B) & 50

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The respondent, a public servant, namely a Penolong Pegawai Penguatkuasa with the Kementerian Dalam Negeri, Butterworth was charged with two offences under s 16(a)(B) of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act'). In the first charge, he was charged for corruptly receiving a sum of RM1,500 from Ng Lap Ken (an agent provocateur identified as SP6 at the trial). In the second charge, he was alleged to have received a sum of RM1,500 from Ng Lap Ken through a CIMB bank account in the name of one Lim Choom Peng. Briefly, the MACC set up a sting operation on information received that certain officers and staff of Bahagian Kawalan Penapisan Filem dan Penguatkuasaan Cawangan Pulau Pinang, Kementerian Dalam Negeri ('FINAS') were protecting a syndicate of illegal VCD and DVD business operators in Penang in exchange for receiving protection money. The MACC rented and took over an illegal VCD Shop owned by SP14 who had made a complaint to MACC of FINAS Officers demanding protection money. In the sessions court, the sessions court judge ('the SCJ') ruled that from the evidence adduced, the prosecution had established a prima facie case that the respondent received money from SP6. She stated that from a viewing of the video recording on exh P13B, it could be seen that SP6 and that the prosecution had proven that the respondent had received gratification of RM1,500 from SP6, relying on the presumption under s 50(1) of the MACC Act. The SCJ then called upon the respondent to enter his defence. At the end of the defence, the SCJ ruled that it was not a defence of mere denial or afterthought as the defence had been put to SP6 that what was passed to him was a folded blue envelope and not cash of RM1,500. The SCJ ruled that it was not put to the respondent that the item passed from

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SP6 was cash and not a folded blue envelope. The SCJ further ruled that notwithstanding that SP6 had testified that he had counted the money before handing it over to the respondent, there was no evidence of this from the video recording in exh P13B. On appeal, the High Court affirmed the order of the SCJ to acquit and discharge the respondent. Aggrieved by the decision, the public prosecutor filed the present appeal against the High Court's order of acquittal and discharge under the first charge. The appellant submitted that the learned judicial commissioner ('the JC') had erred in finding that the respondent had successfully raised a reasonable doubt and that the respondent's defence was a mere denial and afterthought.

Held, dismissing the appeal and affirming the order of the High Court:

(1) The court took note that the recording, especially the audio was not very clear. It was not recorded nor stated that the respondent had solicited RM1,500 or that the respondent asked for the RM1,500 to be paid inside the car. These contradicted the testimony of SP6 that the respondent asked for RM1,500 and for it to be paid inside the car. Similarly, the recording did not show and did not corroborate the testimony of SP6 that he counted the money at the table before handing it to the respondent. The court agreed with the SCJ that based on the recording, it was not clear whether SP6 passed 30 pieces of RM50 or a blue envelope to the respondent at the restaurant and that this had created a doubt in the prosecution's case against the respondent (see paras 36–37).

(2) On the evidence, the court agreed with the findings of the SCJ and the learned JC that there were a lot of doubts raised about what transpired at the restaurant on that night or that the respondent had received RM1,500 from SP6. These were findings of facts. On evidence, in the record of appeal, there was no reason for the court to interfere with the findings of facts of the lower courts. It was not safe to convict the respondent under the first charge. The SCJ and the learned JC were correct to acquit and discharge the respondent under the first charge (see para 39).

[Bahasa Malaysia summary

Responden, penjawat awam, sebagai Penolong Pegawai Penguatkuasa dengan Kementerian Dalam Negeri, Butterworth dituduh di atas dua kesalahan di bawah s 16(a)(B) Akta Suruhanjaya Pencegahan Rasuah Malaysia ('Akta MACC'). Di dalam tuduhan pertama, beliau dituduh atas penerimaan rasuah sebanyak RM1,500 daripada Ng Lap Ken (ejen provokasi yang dikenali sebagai SP6 di perbicaraan). Di dalam tuduhan kedua, beliau telah dituduh menerima sebanyak RM1,500 daripada Ng Lap Ken melalui akaun bank CIMB atas nama Lim Choom Peng. Secara ringkasnya, MACC menjalankan satu operasi atas maklumat yang diterima bahawa sesetengah pegawai dan staf

Bahagian Kawalan Penapisan Filem dan Penguatkuasaan Cawangan Pulau Pinang, Kementerian Dalam Negeri ('FINAS') melindungi sindiket peniaga VCD and DVD haram di Pulau Pinang dengan balasan penerimaan duit perlindungan. MACC menyewa dan mengambil alih kedai VCD haram yang dimiliki oleh SP14 yang telah membuat aduan kepada MACC mengenai pegawai FINAS yang meminta duit perlindungan. Di dalam mahkamah sesyen, hakim mahkamah sesyen ('HMS') mengutuskan bahawa daripada keterangan yang diberikan, pihak pendakwaan telah membuktikan kes prima facie bahawa responden menerima duit daripada SP6. Beliau menyatakan bahawa daripada permainan rakaman video pada eksh P13B, dapat dilihat bahawa SP6 dan bahawa pihak pendakwaan dapat membuktikan bahawa responden telah menerima imbuhan RM1,500 daripada SP6, bergantung pada andaian di bawah s 50(1) Akta MACC. HMS tersebut kemudiannya memanggil responden untuk memasukkan pembelaan. Di akhir pembelaan, HMS tersebut memutuskan bahawa ia bukanlah pembelaan penafian ataupun fikiran terkemudian kerana pembelaan telah diletakkan kepada SP6 bahawa apa yang diberikan kepadanya adalah sampul biru berlipat dan bukan tunai RM1,500. HMS tersebut memutuskan bahawa ia tidak diletakkan kepada responden bahawa item yang diberikan daripada SP6 adalah tunai dan bukanlah sampul biru berlipat. HMS tersebut seterusnya memutuskan meskipun bahawa SP6 telah memberikan keterangan bahawa beliau telah mengira duit itu sebelum memberikan yang sama kepada responden, tiada keterangan daripada rakaman video ini di eksh P13B. Semasa rayuan, Mahkamah Tinggi menegaskan perintah HMS untuk membebaskan dan melepaskan responden. Tidak berpuas hati dengan keputusan, pihak pendakwaan memfailkan rayuan ini terhadap perintah Mahkamah Tinggi untuk membebaskan dan melepaskan di bawah tuduhan pertama. Perayu berhujah bahawa pesuruhjaya kehakiman ('PK') telah terkhilaf dalam memutuskan bahawa responden telah berjaya membangkitkan keraguan yang munasabah dan bahawa pembelaan responden adalah penafian semata-mata dan fikiran terkemudian.

Diputuskan, menolak rayuan dan mengekalkan keputusan Mahkamah Tinggi:

(1) Mahkamah memberikan perhatian kepada rakaman, lebih-lebih lagi audio adalah tidak jelas. Ia tidak dirakam atau dinyatakan bahawa responden telah menerima rasuah RM1,500 ataupun bahawa responden meminta atau RM1,500 untuk dibayar di dalam kereta. Ini bercanggah dengan testimoni SP6 bahawa responden meminta RM1,500 dan untuk yang sama dibayar di dalam kereta. Pada yang sama, rakaman tidak menunjukkan dan tidak menyokong testimoni SP6 bahawa beliau telah mengira duit di meja sebelum memberikannya kepada responden. Mahkamah bersetuju dengan HMS bahawa berdasarkan rakaman, ia adalah tidak jelas sama ada SP6 memberikan 30 helai RM50 atau sampul

biru kepada responden di restoran dan bahawa ini telah menciptakan keraguan di dalam kes pendakwaan terhadap responden (lihat perenggan 36–37).

(2) Di atas keterangan, mahkamah bersetuju dengan penemuan-penemuan HMS dan PK yang bijaksana bahawa terdapat banyak keraguan yang dibangkitkan tentang apa yang terjadi di restoran pada malam atau bahawa responden telah menerima RM1,500 daripada SP6. Ini adalah penemuan-penemuan fakta. Pada keterangan, di dalam rekod rayuan, tiada alasan untuk mahkamah untuk campur tangan dengan penemuan-penemuan fakta mahkamah-mahkamah rendah. Ia adalah tidak selamat untuk mensabitkan responden di bawah tuduhan pertama. HMS dan PK yang bijaksana betul dalam membebaskan dan melepaskan responden di bawah tuduhan pertama (lihat perenggan 39).]

Notes

For a case on bribery in general, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) para 151.

Cases referred to

Agudosi Ikenna Emmanuel v PP [2016] 2 MLJ 596, CA (refd)
Boardman v Director of Public Prosecutions [1974] 3 All ER 887, HL (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Dato' Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193, FC (refd)
Ghasem Hozouri Hassan v Pendakwa Raya [2018] MLJU 601, FC (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217, SC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65, CA (refd)
Makin v A-G for New South Wales [1894] AC 57, PC (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Thavanathan a/l Balasubramaniam v PP [1997] 2 MLJ 401; [1997] 3 CLJ 150, SC (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259, FC (refd)
Wan Mohd Azman bin Hassan @ Wan Ali v PP [2010] 4 MLJ 141, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 60(1), 92(1)
Criminal Procedure Code ss 173, 180
Evidence Act 1950 ss 14, 15
Malaysian Anti-Corruption Commission Act 2009 ss 16(a)(B), 24, 50(1), 52(1)

Appeal from: Criminal Appeal No 42R(A)-4–05 of 2016 (High Court, Pulau Pinang)

Wong Poi Yoke (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
A Chandra Segaran a/l Achannah (Chandra Segaran) for the respondent.

Stephen Chung JCA (delivering judgment of the court):

THE APPEAL

[1] The respondent, a public servant, namely a Penolong Pegawai Penguatkuasa with the Kementerian Dalam Negeri, Butterworth, was charged for two offences under s 16(a)(B) of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act'). In the first charge, he was charged for corruptly receiving a sum of RM1,500 from Ng Lap Ken (an agent provocateur identified as SP6 at the trial) at Restoran Pelita, Taman Chai Leng, Seberang Prai, Penang on 24 September 2013 at about 8.55pm as an inducement for him to forbear from taking any action against Ng Lap Ken from operating an illegal VCD and DVD business at Taman Chai Leng, Seberang Perai and punishable under s 24 of the same Act.

[2] In the second charge, he was alleged to have on 23 October 2013 at about 4.23pm corruptly received a sum of RM1,500 from Ng Lap Ken through a CIMB bank account in the name of one Lim Choon Peng as an inducement for him to forbear the same action as in the first charge.

[3] At the end of the trail the learned sessions court judge ('SCJ') acquitted and discharged the respondent under both charges. The appellant appealed against the order of acquittal and discharge to the High Court. After hearing submissions, the High Court dismissed the appeal and affirmed the order of acquittal and discharge of the SCJ.

[4] The appellant filed an appeal against the order of the High Court in respect of the first charge but did not file any appeal in respect of the acquittal and discharge under the second charge. Hence this appeal before us was in respect of the acquittal and discharge under the first charge only.

THE FACTUAL BACKGROUND

[5] The MACC set up a sting operation on information received that certain officers and staff of Bahagian Kawalan Penapisan Filem dan Penguatkuasaan Cawangan Pulau Pinang, Kementerian Dalam Negeri ('FINAS') were protecting a syndicate of illegal VCD and DVD business operators in Penang in exchange for receiving protection money. SP2 and SP3 were in charge of the operation called 'Ops Power'. The MACC rented and took over an illegal VCD

shop owned by SP14 who had made a complaint to MACC of FINAS officers demanding protection money.

[6] SP6 was assigned to operate the VCD shop undercover to report if any FINAS officers demanded protection money. On 23 September 2013, SP6 received a phone call from SP14 that a suspect named Alias ('the respondent') had contacted him and demanded RM1,500 to be paid in forbearance from taking legal action against the premises operated by SP6. SP14 told SP6 that the respondent would contact SP6 by phone to arrange the time and place to meet to hand over the money. About an hour later SP6 received a missed call from the respondent and SP6 informed SP3 who instructed SP6 to return the phone call. At about 10.15pm SP6 returned the missed call and the receiver introduced himself as 'Alias from Censor Board.' In that phone conversation the respondent told SP6 that it was actually SP14 who had requested him to call SP6 and the respondent asked SP6 to meet him at Pelita restaurant.

[7] The next day, on 24 September 2013, SP6 received a couple of missed calls from the respondent. At 5pm he returned the call and they arranged to meet that night. At 8.45pm SP6 called the respondent after receiving another missed call from the respondent who was waiting for SP6 at Pelita restaurant. After obtaining approval from SP3, SP6 arrived at the restaurant at about 9pm and he noted the presence of other MACC officers in the restaurant and that the respondent was seated at a table. They introduced each other and SP6 said the respondent asked him to pay the cash of RM1,500 inside his car who then stood up to wash his hands. When the respondent returned to the table SP6 passed the money to the respondent who reached out to accept the cash and put it in his trouser pocket.

[8] SP6 was fitted with a recording devise with a pinhole video camera and the transaction was recorded.

IN THE COURTS BELOW

[9] At the end of the prosecution's case, the SCJ ruled that from the evidence adduced the prosecution had established a prima facie case that the respondent received money from SP6 at the Pelita restaurant on the date and time as stated in the first charge. The SCJ said that from a viewing of the video recording in exh P13B at 21:13:08 hours, it could be seen that SP6 passed money to the respondent who took it from SP6 and that the prosecution had proven that the respondent had received the gratification of RM1,500 from SP6, relying on the presumption under s 50(1) of the MACC Act. The SCJ then called upon the respondent to enter his defence.

[10] The respondent elected to give evidence on oath. The respondent

denied receiving the cash of RM1,500 from SP6. He said he was directed by his superior officer ('SP11') to meet SP14 for work related issues. He said it was SP11 who had provided the phone number of SP14 for him to call and he did not know why SP11 asked him to meet SP14 and he did not ask SP11 for any reason. He said it was SP14 who asked him to call and to meet SP6.

[11] The respondent testified that he was given a blue folded envelope by SP6 who asked him to pass the envelope to his boss. He said he did not know what was inside the envelope and did not open it and all he did was to pass the blue folded envelope to his boss the next morning. He said that the blue folded envelope could not have contained cash of RM1,500 as alleged because if it did, it would be quite bulky. The respondent said that the blue envelope was slim and he was certain that it did not contain any cash and if he knew that it contained cash, he would have refused to accept the envelope from SP6. The respondent called two witnesses, one of whom was SD3, an employee of FINAS. SD3 testified that he had previously on different occasions driven SP11 to meet SP14.

[12] At the end of the defence, and at the end of the trial, the SCJ ruled that it was not a defence of mere denial or afterthought as the defence had been put to SP6 that what was passed to him was a folded blue envelope and not cash of RM1,500. The SCJ ruled that it was not put to the respondent that the item passed from SP6 was cash and not a folded blue envelope. The SCJ further ruled that notwithstanding that SP6 had testified that he had counted the money before handing it over to the respondent, there was no evidence of this from the video recording in exh P13B. The SCJ ruled that the defence of the respondent had rebutted the presumption and also raised a reasonable doubt in the prosecution's case. The SCJ then acquitted and discharged the respondent.

[13] On appeal, the High Court affirmed the order of the SCJ to acquit and discharge the respondent. Hence the public prosecutor's appeal against that decision of the High Court before us.

THE APPEAL

The appellant's submission

[14] In his petition, the appellant contended that the learned judicial commissioner ('JC') had erred in discharging and acquitting the respondent under the first charge although the appellant had successfully proven their case beyond reasonable doubt against the respondent at the end of the defence case.

[15] The appellant submitted that the learned JC had erred in finding that the respondent had successfully raised a reasonable doubt. It was submitted that the respondent's defence was a mere denial and afterthought which did not rebut the presumption under s 50(1) of the MACC Act because the respondent's defence was of only receiving a blue envelope and he was directed to give it to SP11 was denied by SP6 and was never put to SP11.

[16] It was submitted that although the appellant did not pursue any appeal against the acquittal under the second charge, the learned JC had erred in finding that the evidence relating to the second charge could not be used for the first charge. It was submitted that the learned JC had erred in distinguishing the facts of *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401; [1997] 3 CLJ 150 in dismissing the use of the evidence for the second charge to support the conviction of the first charge which was clearly contrary to the principle in the said case.

[17] The appellant submitted that the learned JC had erred in finding that the SCJ was correct to re-evaluate the evidence of SP6 and SP11 at the defence stage. It was submitted that the learned JC had erred in finding that the evidence of SP6 was doubtful and exaggerated. It was argued that any discrepancies or conflicting evidence given by SP6 and the transcripts were not material contradictions and that SP6's evidence was amply supported by exhs P10, P13 B, P16, P17, P18 and P25. It was submitted that under s 52(1) of the MACC Act, SP6's evidence as an agent provocateur did not require corroboration and should not be regarded as an unreliable witness.

The respondent's submission

[18] Counsel for the respondent submitted that SP6 being a trap witness who took the video through a hidden camera was not a credible witness. Firstly, he said he counted the money before handing it over to the accused but there was no evidence of this from the video recording. Secondly, SP6 alleged that the accused asked him to pass the money in the car but this too was not reflected in the video nor transcripts. Thirdly, SP6 said the accused put the money into his pocket but this was not shown in the video. Instead it showed the accused putting what was received into his bag. It was submitted that the SCJ had dealt with these discrepancies and after re-evaluation, the SCJ found doubts in the testimony of SP6.

[19] It was submitted that the prosecution was also unsure of its case because in his submission in reply at the end of the prosecution's case the learned DPP submitted under 'Kemungkinan mengambil rasuah di tempat itu terang' berhujah bahawa 'Wang itu bertukar tangan dengan amat pantas tiada siapa yang akan perasan kerana jika dilihat perbandingan masa'.

[20] The respondent submitted that although SP6 said that he handed the cash of RM1,500 to the accused, the accused denied receiving any cash but a blue envelope on that night in the restaurant. It was submitted that if SP6 had passed the money to the accused as he alleged, the MACC officers who were present would have seized the cash from the accused but the cash was never seized from the accused. It was submitted that this raised a doubt in the testimony of SP6 and the prosecution's case.

[21] Counsel referred to the discrepancy in the testimony of SP11 who denied that he knew SP14 or that he had asked and received protection money from SP14, whereas SP14 testified that he knew and paid protection money to SP11. It was submitted that there was no explanation for this discrepancy which created another doubt in the prosecution's case. It was submitted that the appellant had failed to prove its case against the respondent.

OUR DECISION

[22] To reiterate, the appellant submitted that the learned JC had erred in finding that the respondent had successfully raised the innocent explanation when in fact the respondent's defence was a bare denial and afterthought which did not rebut the presumption under s 50(1) of the MACC Act. It was argued that the defence of only receiving a blue envelope and that he was directed to give it to SP11 was denied by SP6 and which was never put to SP11 and that SP6 was a credible witness. It was also submitted that the defence had been rebutted through similar fact evidence that the respondent had corruptly received another payment of RM1,500 which was supported by the transcripts of phone conversations between SP6 and the respondent on 23 October 2013 in respect of the second charge and which evidence was adduced at the joint trial. It was submitted that the learned JC had erred in distinguishing the case of *Thavanathan a/l Balasubramaniam v Public Prosecutor* and erred in finding that the SCJ was correct that the evidence of SP6 was doubtful and exaggerated after re-evaluating the evidence of SP6 and SP11 at the defence stage.

[23] First, it was not in dispute that SP6 was an officer of the MACC and was instructed to act as an undercover agent or agent provocateur in the sting operation. His role was to uncover the offence and gather evidence to be given at the trial against the accused. His evidence as an agent provocateur was different from that of an accomplice and as such required no corroboration. Notwithstanding that, whether SP6 was a credible witness or otherwise is a finding of fact to be determined by the trial judge. In this case there was no evidence of entrapment: see *Wan Mohd Azman bin Hassan @ Wan Ali v Public Prosecutor* [2010] 4 MLJ 141. The crux of this appeal, based on the evidence of SP6, who was the key witness for the prosecution, was whether the appellant had established his case against the respondent under the first charge.

A **[24]** Secondly, after reading the submissions of the appellant in the lower courts, the appellant did not submit on similar fact evidence or that the evidence of receipt of corrupt money in respect of the second charge was relevant and admissible to establish that the receipt of the RM1,500 under the first charge was intentional or accidental, or to rebut a defence which would
B otherwise be open to the accused. This was raised for the first time before us.

[25] The appellant's reference to the case of *Thavanathan a/l Balasubramaniam v Public Prosecutor* in the courts below was in respect of the
C presumption under s 50(1) of the MACC Act and whether the respondent's explanation was innocent or otherwise. In that case, the question was whether the evidence in the earlier trial could be admitted in subsequent trial where such evidence are relevant to facts in issue. On the facts, we agreed that the learned JC was correct to distinguish that case.

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[26] We refer to ss 14 and 15 of the Evidence Act 1950 on similar fact evidence. *Makin v A-G for New South Wales* [1894] AC 57 laid down the principle on the admissibility of similar fact evidence, which consists of two limbs: see *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217. The
E judge has to decide whether the evidence which it is proposed to adduce is sufficiently substantial having regard to the purpose to which it is professedly directed to make it desirable in the interest of justice and fairness: *Boardman v Director of Public Prosecutions* [1974] 3 All ER 887. This was never submitted before us.

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[27] It was not in dispute that at the material time the respondent was an enforcement officer with FINAS (see exh P2) and SP6 did not know and had not met the respondent prior to their meeting at *restoran* Pelita. As part of the sting operation, it was arranged for SP6 to operate the illegal VCD and DVD
G stall, which was owned by SP14, together with an employee of SP14 known as Lim. This Lim was not the Lim Choon Peng ('SP7') stated in the second charge where it was alleged that on 23 October 2013 that the respondent had asked SP6 for RM1,500 to be deposited into a bank account of Lim Choon Peng. This alleged incident on 23 October 2013 under the second charge occurred
H about a month after the incident at *restoran* Pelita on 24 September 2013 and had no bearing on what transpired at *restoran* Pelita earlier to show a propensity on the part of the respondent on 24 September 2013 that he was corrupt.

[28] According to the MACC report of SP14 made on 23 September 2013
I at 2200 hrs (exh P25), SP14 stated that on 23 September 2013 at about 12 noon he received a call from a Malay man who introduced himself as Alias (the respondent) from the censor board who was sent by his superior Tengku Jamaludin (SP11) to collect the monthly fee replacing Man J (also referred to as JJ in the notes of proceedings). That meant he was collecting on behalf of

SP11. That was the only report lodged by SP14. There was no earlier report that the respondent had previously or regularly solicited and received corrupt money from SP14. Exhibit P25 tend to contradict the contention of the appellant on similar fact evidence. Therefore it was misconceived for the appellant to argue that based on similar fact evidence, relying on the transcripts in exhs P17 and P18 of the phone conversations between SP6 and the respondent on 23 October 2013, that the respondent had corruptly received the RM1,500 at *restoran* Pelita.

[29] We also took note of the fact that the respondent was acquitted and discharged under the second charge and the appellant did not file any appeal against that acquittal and discharge. That meant that the appellant had failed to prove its case against the respondent that he had corruptly received the RM1,500 from SP6 through the bank account of Lim Choon Peng. Therefore the appellant could not rely on the evidence adduced in respect of the second charge as similar fact evidence that the respondent had corruptly received the RM1,500 at *restoran* Pelita. In a criminal case, whether the respondent had corruptly solicited and received the RM1,500 at *restoran* Pelita must be proved by the appellant as a matter of fact and law beyond reasonable doubt. That burden does not shift onto the respondent.

[30] Based on the appeal record, the SCJ had called on the respondent to enter defence after making a finding of prima facie case. At the end of the defence, and at the end of the trial, after re-evaluating the evidence of SP6 and SP11, both the SCJ and the learned JC were of the view that the evidence of SP6 was doubtful and exaggerated. The courts below found that on a balance of probabilities that the explanation of the respondent had rebutted the presumption under s 50(1) of the MACC Act that he had corruptly received the RM1,500 at *restoran* Pelita on that night. They also found that the defence had raised a doubt on the prosecution's case. The appellant submitted that the learned JC had erred in finding that the SCJ was correct in law to re-evaluate the evidence of SP6 and SP11 and then made a finding that the evidence of SP6 was doubtful at the defence stage.

[31] We revisit the test to be applied in determining whether a prima facie case had been made out under ss 173 or 180 of the Criminal Procedure Code. It has been settled that a judge sitting alone must subject the prosecution evidence to maximum evaluation and ask himself whether if he decides to call the accused to enter his defence and the accused elects to remain silent, is the judge prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative, then no prima facie case has been made out. It does not mean that the prosecution has to prove its case beyond a reasonable doubt at this intermediate stage: see *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 followed in *Looi Kow*

Chai & Anor v Public Prosecutor [2003] 2 MLJ 65. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence: *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193 (FC).

[32] On the above authorities, on the record of appeal, the SCJ failed to make a finding on the credibility or otherwise of SP6 and SP11 before ruling that a prima facie case has been made out which amounted to a misdirection. However we were of the view that this misdirection did not result in any miscarriage of justice based on the totality of the evidence at the end of the trial. An appellate court retains a discretion to dismiss an appeal even there is a misdirection if it is of the opinion that no substantial miscarriage of justice has occurred. This discretion accorded to an appellate court is codified in the Courts of Judicature Act 1964, specifically s 92(1) and the proviso to s 60(1): *Ghasem Hozouri Hassan v Pendakwa Raya* [2018] MLJU 601 (FC); see also *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259.

[33] In this case, at the end of the defence and at the end of the trial, the SCJ re-evaluated the totality of the evidence and found that the defence had rebutted the presumption on a balance of probabilities and also found that the defence had raised a reasonable doubt on the prosecution's case. On appeal the learned JC had made a finding that the SCJ was correct in doing so. Both the SCJ and learned JC had directed themselves and dealt with this in separate exercise: see *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169. It is trite that an appeal being a continuation of the proceedings by way of rehearing, the appeal court is empowered to review all the available evidence as adduced before it: *Agudosi Ikenna Emmanuel v Public Prosecutor* [2016] 2 MLJ 596.

[34] Coming back to the evidence, it was SP14 who told SP6 about the respondent and that the respondent asked SP14 to pay monthly protection money and made arrangement to meet to pass the money. SP14 told the respondent to contact his PR person namely SP6 and he told SP6 that he would give the telephone number of SP6 to the respondent for the respondent to contact SP6.

[35] SP6 testified that on 23 September 2013 SP14 called him that the respondent asked for RM1,500 as an inducement not to take any action against him. After SP14 had telephoned the respondent and SP6, the respondent and SP6 telephoned each other to make arrangements to meet. They met at *restoran* Pelita on 24 September 2013 at about 9pm where SP6 passed something to the respondent while both were seated at a table. SP6 testified that the respondent asked him to pass the RM1,500 inside the car but previously his officers

instructed him not to pass money inside a car. Therefore he passed the cash money consisting of 30 pieces of RM50 which amounted to RM1,500 after he counted the money at the table before handing it to the respondent in the restaurant. Whereas the respondent testified that he did not ask for money and that he received a thin folded blue envelope from SP6 to be passed to SP11. He said he did not know the contents of the envelope and it could not have contained the 30 pieces of RM50 amounting to RM1,500 as alleged otherwise it would be thick or bulky.

[36] During the appeal the learned DPP requested for the audio and visual recording at *restoran* Pelita to be played and it was played and shown in court. We took note that the recording, especially the audio, was not very clear and this was reflected in the transcripts with the words ('tak jelas') throughout the transcripts. Listening and watching the recording in court and reading the transcripts, it was not recorded nor stated that the respondent had solicited RM1,500 or that the respondent asked for the RM1,500 to be paid inside the car. These contradicted the testimony of SP6 that the respondent asked for RM1,500 and for it to be paid inside the car (see p 20 *Jld* 3 appeal record). Similarly the recording did not show and did not corroborate the testimony of SP6 that he counted the money at the table before handing it to the respondent. Again this contradicted his testimony as such.

[37] In the same testimony, SP6 said he passed the 30 pieces of RM50 in his right hand to the respondent who received the money with his right hand and put it into his right trouser pocket without counting the money. In cross-examination, SP6 was challenged on this and he then said he was not sure whether it was put inside the pocket or a bag. It was also put to SP6 that he passed a folded thin blue envelope to the respondent to be passed to SP11 to which SP6 denied. Watching the recording, at normal speed and in slow motion several times, we agreed with the finding of the SCJ that it was not clear whether SP6 passed 30 pieces of RM50 or a blue envelope to the respondent at the restaurant and that this had created a doubt in the prosecution's case against the respondent.

[38] We bore in mind that this was a sting operation conducted by the MACC against FINAS officers. The RM1,500 was not given by SP14. Instead it was from MACC via SP3 to SP6 to be passed to the respondent at the restaurant. The money was not marked and no photograph was produced of this money to be used as trap money. When the respondent left the restaurant, he was not arrested there and then although there were MACC officers in the restaurant as part of the sting operation. None of them were called to testify that they saw SP6 handing over the RM1,500 to the respondent and that it was not a blue envelope. In the circumstances, one of them could have secretly recorded the transaction on video or mobile phone to corroborate what SP6

had said, but this was not done. The money was never seized nor recovered from the respondent or from SP11 although SP6 testified that he handed the RM1,500 to the respondent who said he was asked to pass the envelope to SP11. Although SP11 was called to testify, he was not asked by the prosecution to say that he never received the money from the respondent as the respondent had alleged. Since it was a sting operation, the respondent should have been arrested and the money recovered at the restaurant on that night but this was not done. There was no explanation given by the prosecution on what happened to the RM1,500.

[39] On the evidence, we agreed with the findings of the SCJ and the learned JC that there were a lot of doubts raised about what transpired at the restaurant on that night or that the respondent had received the RM1,500 from SP6: see *Mat v Public Prosecutor* [1963] 1 MLJ 263. These were findings of facts. On evidence, in the record of appeal, there was no reason for us to interfere with the findings of facts of the lower courts. We were unanimous that it was not safe to convict the respondent under the first charge. The SCJ and the learned JC were correct to acquit and discharge the respondent under the first charge. Therefore the appeal was dismissed and we affirmed the order of the High Court given on 23 March 2018.

Appeal dismissed and order of High Court affirmed.

Reported by Addibah Adnan